From: Richard Probst
To: Microsoft ATR
Date: 1/28/02 1:45am
Subject: comments on proposed Microsoft settelemt

I am writing to comment on the proposed Microsoft settlement. I believe the settlement is deeply inadequate, and should be rejected by the Court, for the following five reasons:

(1) The settlement provides no protection for all but the largest Microsoft competitors. It prevents Microsoft from blocking what is referred to as "middleware", but only if the provider of the middleware has sold a million copies of the application and has been in business for over a year. Thus, AOL, Kodak, and Real Networks are protected from Microsoft's monopoly power, but not the smaller and younger firms that are the true source of innovation. Instead, the settlement should prevent Microsoft from blocking middleware from the desktop, no matter who provides the middleware. Only with this provision will consumers benefit from unchecked innovation.

(2) The settlement allows Microsoft to prevent its licensees from placing non-Microsoft icons on the desktop, unless the icon competes with a Microsoft product. Microsoft should have no control over what icons its licensees can place on the desktop. As written, the settlement could allow Microsoft to block the availability of an innovative application until Microsoft had completed its own competitive offering, thus eliminating any early-to-market benefit to the application inventor.

(3) The settlement does not require Microsoft to publish its APIs until the "final beta" release. This is much too late to allow another firm to develop or modify an application to use a new API before Microsoft officially launches the new release. This means that Microsoft can control which applications work with a new release of an operating system at the time of the release, which gives Microsoft power to limit innovation by its competitors. Instead, Microsoft should be required to publish APIs earlier in the history of a release (6 months before commercial availability is a reasonable requirement), and to publish timely updates if the APIs change before the "final beta" release.

(4) The settlement requires firms that use the APIs published under the terms of the settlement to give Microsoft the code which they wrote to use the APIs. Under no circumstances should Microsoft have the right to code developed by its competitors. This provision of the settlement actually rewards Microsoft with a competitive advantage, which is an ironic and inappropriate response to illegal monopolistic behavior.

(5) The settlement does not prevent Microsoft from structuring discounts to punish its licensees who work with Microsoft competitors. It also allows Microsoft to terminate a licensing agreement without prior notice -- which could prevent a hardware vendor from delivering a new computer model on

schedule (for example, in time for the Christmas selling season). If the termination is determined not to have been legal under the terms of the settlement, Microsoft will be forced to reinstate the license, but the hardware vendor may already have been irreparably damaged. Instead, the settlement should require Microsoft to get prior approval for license terminations and changes in discounts.

These and other flaws in the proposed settlement have led me to wonder if Microsoft's own lawyers drafted some of the terms. The settlement is not a sufficient punishment and will not prevent further monopolistic behavior. The Court should reject the proposed settlement.

Sincerely,

Richard Probst

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